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Internal Revenue Service

memorandum

CC:TL:Br3

GEBowden

SEP 10 1990

date:

to: District Counsel, Washington, D.C. MA:WAS  
Attn: Richard Fultz

from: Chief, Branch 3, Tax Litigation Division CC:TL:Br3

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subject: [REDACTED]

Your memorandum of August 28, 1990, requested Tax Litigation Advice. You have requested that this advice be provided on an expedited basis prior to September 14, 1990.

ISSUES

1. Whether certain documents received from third parties are grand jury materials for purposes of Federal Rule of Criminal Procedure 6(e).

2. Whether obtaining the authority of the third parties to provide the previously subpoenaed documents to the IRS was sufficient to permit the use of the documents as a basis for the statutory notice of deficiency.

3. If the documents are grand jury documents, whether an ex parte Rule 6(e) order would be available to allow the use of the materials in this civil proceeding. If such an order is available, whether it would cure any defects in the use of the documents as a basis for the statutory notice of deficiency.

CONCLUSIONS

1. These documents are not grand jury materials.

2. Third party consent is irrelevant to Rule 6(e). It is, however, necessary to obtain third party consent to use the documents inasmuch as they are the property of the third parties.

3. A conclusive answer to Issue 3 seems unnecessary based on our resolution of Issue 1. If it were determined that these documents were grand jury materials, we would argue that good faith reliance on our determination that these documents were not grand jury materials makes suppression inappropriate.

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## FACTS

The third party documents in question are business records of individuals and companies that were either vendors or customers of the petitioner during the years at issue. It is unclear whether the list of names of petitioner's vendors and customers was obtained during the grand jury investigation or in the administrative investigation prior to the grand jury. The list was not obtained, however, from documents or testimony presented to the grand jury. The business records were subpoenaed for presentation to the grand jury, but were never actually presented to the grand jury. The grand jury did not return an indictment against the petitioner.

Subsequent to the grand jury, the Assistant U.S. Attorney who conducted the investigation sent letters to each third party seeking their permission to turn copies of the records over to the IRS. Such copies were then turned over to the District Director's office in Albany, New York. No Rule 6(e) order was obtained prior to the release of the documents. Partially based on this information, a statutory notice of deficiency was issued; the instant case resulted.

## DISCUSSION

Issue 1. We agree with the conclusion reached in your memorandum that these documents are not grand jury material. It appears that this case would be appealable to the Second Circuit. Under the Golsen rule, Second Circuit precedent applies. As noted in your memorandum, the Second Circuit has held that material which is sought for its own sake rather than to learn what went on in the grand jury is not grand jury material. United States v. Interstate Dress Carriers, 280 F.2d 52 (2d Cir. 1960). The Tax Court has recently opined that it believes this case is still valid precedent in the Second Circuit. DiLeo v. Commissioner, T.C. Memo. 1989-540. The Second Circuit has also suggested that subpoenaed documents may never be grand jury materials. United States v. Weinstein, 511 F.2d 622, 627 n.5 (2d Cir. 1975) (subsequent history omitted).

We would also be prepared to argue that because the documents were never submitted to the grand jury, they cannot be grand jury material. Anaya v. United States, 815 F.2d 1373 (10th Cir. 1987); United States v. Phillips, 843 F.2d 438 (11th Cir. 1988).

Issue 2. If the documents at issue were indeed grand jury material, permission of the third parties would be irrelevant to Rule 6(e). However, because these documents are the property of third parties, the grand jury had only a custodial interest in them. The Assistant U. S. Attorney properly sought the third parties' permission to retain the documents. Without such permission, the documents would have had to be returned to the third parties. Matter of Special March 1981 Grand Jury (Almond

Pharmacy, Inc.), 753 F.2d 575, 579-580 (7th Cir. 1985);  
Interstate Dress Carriers, 280 F.2d 52.

Issue 3. Because we have concluded that the materials at issue are not grand jury material, seeking a Rule 6(e) order is inappropriate at this time. If the Tax Court or the District Court for the Southern District of New York were to conclude that the documents are grand jury material, we would argue against suppression on a good faith reliance theory. See Kluger v. Commissioner (Kluger I), 83 T.C. 309 (1984) (good faith exception to exclusionary rule set forth in United States v. Leon, 468 U.S. 897 (1984) makes suppression inappropriate); Graham v. Commissioner, 770 F.2d 381 (3rd Cir. 1985) (good faith reliance on facially valid disclosure order makes suppression inappropriate).

It is possible to seek a determination from the District Court that the material involved is not grand jury material. Sample copies of such orders may be obtained from Ron Slonaker of Criminal Tax, at 343-0928. We believe that such a determination is not necessary in this case because it is quite clear that these materials are not grand jury materials.

As a cautionary note, however, the District Court for the Southern District of New York has recently required the government to seek an order determining that the documents used in DiLeo were not grand jury materials. After losing the issue in the Tax Court opinion cited above, the taxpayer sought an order that the DiLeo materials were being used in violation of Rule 6(e). At a hearing last month, the Court stated that the government could not rely on its own determination that the documents were not grand jury materials and suggested that the government request an order making such a determination. We plan to file a motion requesting the order.

#### SUMMARY

We conclude that the documents at issue are not grand jury materials for purposes of Rule 6(e). We have coordinated this issue with Criminal Tax and they concur. As discussed above, it is possible for you to seek a protective determination in District Court but we are inclined to think it unnecessary at this time. If you require additional information, please contact George Bowden at 566-3407.

  
SARA M. COE